

Adopted	Rejected
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## COMMITTEE REPORT

YES:	12
NO:	2

### MR. SPEAKER:

*Your Committee on Local Government, to which was referred House Bill 1104, has had the same under consideration and begs leave to report the same back to the House with the recommendation that said bill **be amended** as follows:*

1       Page 2, line 9, delete "IC 36-5-2-6.5(6);" and insert  
2       "IC 36-5-2-6.5(4);".  
3       Page 2, line 13, delete "IC 36-5-2-6.5(6)." and insert  
4       "IC 36-5-2-6.5(4).".  
5       Page 2, line 17, delete "IC 36-5-2-6.5(6);" and insert  
6       "IC 36-5-2-6.5(4);".  
7       Page 2, line 22, delete "IC 36-5-2-6.5(6)." and insert  
8       "IC 36-5-2-6.5(4).".  
9       Page 3, line 8, delete "IC 36-5-2-6.5(6)," and insert  
10      "IC 36-5-2-6.5(4),".  
11      Page 3, line 29, delete "IC 36-5-2-6.5(6)." and insert  
12      "IC 36-5-2-6.5(4).".  
13      Page 3, line 34, delete "IC 36-5-2-6.5(6)" and insert  
14      "IC 36-5-2-6.5(4)".  
15      Page 3, line 42, delete "IC 36-5-2-6.5(6)." and insert  
16      "IC 36-5-2-6.5(4).".

- 1 Page 4, line 3, delete "IC 36-5-2-6.5(6)," and insert
- 2 **"IC 36-5-2-6.5(4),"**.
- 3 Page 4, delete lines 27 through 30.
- 4 Page 4, line 31, delete "(4)" and insert **"(3)"**.
- 5 Page 4, delete lines 33 through 34.
- 6 Page 4, line 35, delete "(6)" and insert **"(4)"**.
- 7 Page 4, after line 36, begin a new paragraph and insert:
- 8 **"SECTION 6. IC 36-7-11.4 IS ADDED TO THE INDIANA CODE**
- 9 **AS A NEW CHAPTER TO READ AS FOLLOWS [EFFECTIVE**
- 10 **JULY 1, 2002]:**
- 11 **Chapter 11.4. Lincoln Way East Preservation**
- 12 **Sec. 1. (a) The purpose of this chapter is to preserve:**
- 13 **(1) from deterioration;**
- 14 **(2) from improperly conceived or implemented change; and**
- 15 **(3) for the continued health, safety, enjoyment, and general**
- 16 **welfare of the citizens of Indiana;**
- 17 **a historic, scenic, aesthetically pleasing, and unique part of a street**
- 18 **lying within Mishawaka constituting the backbone of a unique**
- 19 **residential area.**
- 20 **(b) The general assembly intends, by passage of this chapter, to:**
- 21 **(1) encourage private efforts to maintain and preserve that**
- 22 **part of the street and other similar streets and areas in**
- 23 **Indiana;**
- 24 **(2) promote orderly and proper land usage; and**
- 25 **(3) preserve significant tourist attractions of historical and**
- 26 **economic value in Indiana;**
- 27 **by limiting and restricting unhealthful, unsafe, unaesthetic, or**
- 28 **other use of unique areas that would be inconsistent with their**
- 29 **character as tourist attractions and with the general welfare of the**
- 30 **public.**
- 31 **Sec. 2. As used in this chapter, "bordering property" means a**
- 32 **parcel of land any part of which lies within one hundred (100) feet**
- 33 **from any part of the right-of-way of Lincoln Way East.**
- 34 **Sec. 3. As used in this chapter, "commission" refers to the**
- 35 **Lincoln Way East preservation commission established by this**
- 36 **chapter.**
- 37 **Sec. 4. As used in this chapter, "department" refers to the**
- 38 **Mishawaka planning department.**

1       **Sec. 5. As used in this chapter, "interested party" means any of**  
2 **the following:**

- 3       (1) The governor.  
4       (2) The Indiana department of transportation.  
5       (3) The department of natural resources.  
6       (4) The executive of Mishawaka.  
7       (5) Each owner or occupant owning or occupying Lincoln  
8       Way East or bordering property to a depth of two (2)  
9       ownerships of the perimeter of the property.  
10      (6) An owner, occupant, or other person having a legal or  
11      equitable interest in a property on Lincoln Way East.  
12      (7) The department.

13      **Sec. 6. As used in this chapter, "Lincoln Way East" refers to**  
14 **that part of an east-west street in the city of Mishawaka, St. Joseph**  
15 **County, known as Lincoln Way East, that lies:**

- 16      (1) east of South Brook Avenue; and  
17      (2) west of Capital Avenue;

18 **at the points where South Brook Avenue and Capital Avenue**  
19 **intersect with Lincoln Way East.**

20      **Sec. 7. As used in this chapter, "notice" means written notice:**

- 21      (1) served personally upon the person, official, or office  
22      entitled to the notice; or  
23      (2) served upon the person, official, or office by placing the  
24      notice in the United States mail, first class postage prepaid,  
25      properly addressed to the person, official, or office. Notice is  
26      considered served if mailed in the manner prescribed by this  
27      subdivision properly addressed to the following:

28      (A) The governor, both to the address of the governor's  
29      official residence and to the governor's executive office in  
30      Indianapolis.

31      (B) The Indiana department of transportation, to the  
32      commissioner.

33      (C) The department of natural resources, both to the  
34      director of the department and to the director of the  
35      department's division of historic preservation and  
36      archeology.

37      (D) An occupant, to:

- 38      (i) the person by name; or

(ii) if the name is unknown, to the "Occupant" at the address of the Lincoln Way East or bordering property occupied by the person.

(E) An owner, to the person by the name shown to be the name of the owner, and at the person's address, as the address appears in the records in the bound volumes of the most recent real estate tax assessment records as the records appear in the offices of the township assessors in St. Joseph County.

(F) The department.

**Sec. 8.** As used in this chapter, "occupant" means a person:

(1) occupying:

(A) under a written lease; or

(B) as an owner; and

(2) using for residential purposes;

a residential dwelling located on Lincoln Way East or bordering property.

**Sec. 9.** As used in this chapter, "owner" means a person who owns a legal or an equitable interest in Lincoln Way East or bordering property.

**Sec. 10.** As used in this chapter, "person" means an individual, a corporation, a partnership, an association, a trust, a governmental body or agency, or other entity, public or private, capable of entering into an enforceable contract.

**Sec. 11. (a)** The Lincoln Way East preservation commission is established.

(b) The commission consists of one (1) owner from each property located on Lincoln Way East.

(c) Members of the commission serve without compensation.

(d) The members of the commission shall elect a chairperson, vice chairperson, and treasurer from among the members of the commission.

**Sec. 12. (a)** The commission shall prepare, adopt, and promulgate the rules and regulations that are necessary, desirable, or convenient to the orderly administration of commission affairs and to the implementation of this chapter according to its intent and purpose. The rules and regulations shall be made available in writing or electronically to any person requesting a copy.

(b) Notices, petitions, requests, or other written materials to be filed with the commission shall be filed with the department and directed to the attention of the commission. The department shall:

(1) maintain; and

(2) make available for public inspection;

all records of the commission at the offices of the department.

(c) The city attorney for the city of Mishawaka, or a deputy city attorney selected by the city attorney, is the attorney for the commission. The commission may employ other legal counsel that the commission considers necessary, convenient, or desirable.

(d) The rules and regulations of the commission must specify a time for holding regular meetings to consider any matters properly coming before the commission. The commission shall regularly meet at the designated time if there is any matter requiring consideration or determination as specified in this chapter.

Sec. 13. (a) A public officer or office entitled to receive notice may designate in writing filed with the commission alternate or additional persons to whom notice required to be served upon the officer or office shall also be served. The commission shall maintain a complete list of the persons and their addresses.

(b) A person, an official, or an office that is not served notice in the manner prescribed by this chapter is not considered properly notified unless the person has waived notice in writing.

Sec. 14. A person desiring the commission to consider or determine any matter that is within the commission's jurisdiction under this chapter must, at least thirty (30) days before a regular meeting date of the commission upon which the person desires the commission to determine or consider the matter, file with the commission a petition that does the following:

(1) Specifies in detail the matter the petitioner desires the commission to consider or determine.

(2) Requests that the matter be placed upon the commission's docket for matters to be considered and determined at the meeting.

Sec. 15. (a) The chairperson of the commission:

(1) may, in the chairperson's discretion; or

(2) shall, at the written request of at least two (2) members of the commission;

1 call a special meeting of the commission to consider or determine  
2 a matter for which a petition has been filed.

3 (b) The meeting shall be scheduled for a date:

4 (1) not less than thirty (30); and

5 (2) not more than forty-five (45);

6 days after the filing of the petition.

7 Sec. 16. (a) For good cause shown, the chairperson of the  
8 commission may, at or before a regular or special meeting,  
9 continue any matter docketed for consideration or determination  
10 at the meeting until:

11 (1) the next regular meeting of the commission; or

12 (2) a special meeting set for a date not more than thirty (30)  
13 days following the date of the meeting for which the matter  
14 was previously docketed.

15 (b) The commission may, before a hearing on a petition filed  
16 with the commission, require the person filing the petition, or a  
17 person whose interests appear adverse to those of the petitioner, to  
18 file with the commission before the hearing the following:

19 (1) Maps, plot plans, structural drawings and specifications,  
20 landscaping plans, floor plans, elevations, cross-sectional  
21 plans, architectural renderings, diagrams, or any other  
22 technical or graphic materials.

23 (2) Additional information concerning the petitioner's or the  
24 adverse person's intentions or interest with respect to Lincoln  
25 Way East or bordering property.

26 (3) Any other additional information that the commission  
27 considers relevant to the matters concerning the petition.

28 Sec. 17. (a) A quorum of the commission consists of a majority  
29 of the commission. A quorum must be present for a public hearing  
30 on and the determination of a matter coming before the  
31 commission for which a public hearing is required under this  
32 chapter.

33 (b) Except as otherwise provided in this chapter, a majority vote  
34 of the members of the commission is required for the commission  
35 to take action.

36 (c) A member of the commission may abstain from voting on a  
37 matter if the member states the reasons in the record.

38 (d) If by virtue of the abstention of a member of the commission,

there is not present at a hearing upon a matter at least a majority of the members of the commission able to vote on the matter, the chairperson shall redocket the matter for a hearing or rehearing at:

- (1) the next regular meeting of the commission; or
- (2) a special meeting set for a date not more than thirty (30) days following the date of the meeting at which the matter was or was to be heard.

**Sec. 18. (a)** Upon the conclusion of the hearing on a matter and before the voting, the commission members shall, if requested by:

- (1) the petitioner;
- (2) an interested party; or
- (3) a commission member;

deliberate in private before voting.

(b) The commission shall, before voting, consider conditions proposed to the commission at the hearing by a person, including a commission member, concerning the restrictions, limitations, commitments, or undertakings that might be required by the commission as the condition of a vote favorable to the petitioner.

(c) The commission may:

- (1) on the commission's own motion; or
- (2) at the request of a person;

before voting on a matter, continue the matter to a future meeting so that the petitioner and a person appearing adverse to the petitioner might privately agree upon the restrictions, limitations, commitments, or undertakings to be proposed to the commission as a condition to a vote by the commission favorable to the petitioner.

**Sec. 19. (a)** Not later than thirty (30) days after a vote by the commission finally determining a matter, the commission shall enter a written final order stating the following:

- (1) The names of the members present and voting.
- (2) The total votes cast.
- (3) The basic facts found by the members whose vote for or against the petitioner determined the matter.

(b) If a tie vote occurs, the petition is considered to be determined adversely to the petitioner, with the members casting a vote adverse to the petitioner considered to be the majority.

1       **Sec. 20. (a) If the commission determines affirmatively a matter**  
 2       **conditioned upon:**

3           (1) the observance by a person of a restriction or limitation;  
 4           or

5           (2) the commitment made by or the undertaking of a person;  
 6       the commission shall, not later than ten (10) days after the vote  
 7       determining the matter conditionally, enter a temporary order  
 8       setting forth the restriction, limitation, commitment, or  
 9       undertaking.

10       (b) The commission shall enter a final order approving the  
 11       petition upon and after a hearing at which the petitioner must  
 12       satisfy the commission that the restriction, limitation, commitment,  
 13       or undertaking has been formalized so that an interested party  
 14       may enforce the restriction, limitation, commitment, or  
 15       undertaking in a private action.

16       **Sec. 21. (a) Not later than five (5) days after the commission has**  
 17       **determined a matter by vote, a party who appeared at the hearing**  
 18       **shall, upon request of the commission, file with the commission a**  
 19       **proposed temporary or final order.**

20       (b) A proposed final order must state in detail the basic facts  
 21       that could have been found by the commission based upon  
 22       substantial evidence of probative value actually introduced into  
 23       evidence before the commission at a hearing on the matter.

24       (c) A proposed temporary order must state the basic facts:

25           (1) that could have been found by the commission based upon  
 26           substantial evidence of probative value actually introduced  
 27           into evidence before the commission at a hearing on the  
 28           matter; and

29           (2) upon which the commission could properly have required  
 30           a restriction, a limitation, a commitment, or an undertaking  
 31           as a condition to a final affirmative determination of the  
 32           matter.

33       **Sec. 22. (a) The commission shall keep complete minutes of**  
 34       **meetings. The minutes must reflect the following:**

35           (1) Action taken by the commission.

36           (2) The reasons for the action.

37           (3) The factors considered by the commission in taking the  
 38           action.



1       (b) Copies of the minutes of a meeting shall be provided to a  
2 person requesting a copy.

3       (c) An interested party who desires a transcript of a matter  
4 heard by the commission may, at the interested party's expense,  
5 have a transcript prepared.

6       Sec. 23. (a) The commission shall by rule set fees to be paid by  
7 a person filing a petition with the commission. If the commission  
8 has not set a fee by rule for a type of petition, the fee is twenty-five  
9 dollars (\$25).

10       (b) A person filing a petition with the commission shall pay the  
11 fee required for the filing to the department. The department shall  
12 pay the fee to the treasurer of the commission.

13       (c) The department has no duty regarding the fees collected  
14 under this section except those imposed under subsection (b). Fees  
15 collected under this section:

- 16           (1) do not belong to Mishawaka; and
- 17           (2) are not subject to any of the following:
  - 18               (A) IC 5-11-10.
  - 19               (B) IC 36-2-6.
  - 20               (C) IC 36-3.
  - 21               (D) IC 36-4-8.

22       (d) The commission may accept money from any source for use  
23 in administering this chapter.

24       Sec. 24. (a) A person may not construct on Lincoln Way East  
25 property a structure or feature or reconstruct, alter, or demolish  
26 Lincoln Way East property unless the following conditions have  
27 been met:

28           (1) The person has previously filed with the commission an  
29 application for a certificate of appropriateness in the form  
30 and with the plans, specifications, and other materials that the  
31 commission prescribes.

32           (2) A certificate of appropriateness has been issued by the  
33 commission as provided in this section.

34       (b) After the filing of an application for a certificate of  
35 appropriateness, the commission shall determine whether the  
36 proposed construction, reconstruction, or alteration of the  
37 structure in question:

- 38           (1) will be appropriate to the preservation of the area

1           comprised of Lincoln Way East and bordering property; and  
 2           (2) complies with the architectural and construction standards  
 3           then existing in the area.

4           (c) In determining appropriateness, the commission shall  
 5           consider, in addition to other factors that the commission considers  
 6           pertinent, the historical and architectural style, general design,  
 7           arrangement, size, texture, and materials of the proposed work and  
 8           the relation of the proposed work to the architectural factor of  
 9           other structures in the area. A permit for the construction,  
 10          reconstruction, alteration, or demolition of a structure on Lincoln  
 11          Way East is not valid unless the application for the permit is  
 12          accompanied by a certificate of appropriateness.

13          (d) The issuance of or refusal to issue a permit is a final  
 14          determination appealable under section 26 of this chapter. With  
 15          respect to a certificate of appropriateness, the commission may, by  
 16          rule or regulation, provide for:

- 17           (1) the public hearings;
- 18           (2) notice of the hearings; or
- 19           (3) the filing of the application for the certificate;

20          that the commission considers necessary.

21          Sec. 25. (a) Each owner:

- 22           (1) has a private right of action to:

23           (A) enforce; and

24           (B) prevent violation of;

25          this chapter; and

- 26           (2) may, with respect to Lincoln Way East or bordering  
 27          property:

28           (A) restrain or enjoin, temporarily or permanently, a  
 29          person from violating; and

30           (B) enforce by restraining order or injunction;

31          this chapter.

32          (b) The powers described in subsection (a) include the following:

33           (1) To enforce written commitments, agreements, or  
 34          covenants made in accordance with or under this chapter.

35           (2) To prevent and obtain full relief from a threatened or  
 36          existing violation of this chapter.

37           (3) To:

38           (A) prevent construction, reconstruction, alteration, or

- 1 demolition work upon; and
- 2 (B) obtain full relief from work previously done upon;
- 3 Lincoln Way East property for which a certificate of
- 4 appropriateness was required but was not issued by the
- 5 commission. A showing that issuance of certificates of
- 6 appropriateness for the work could not properly have been
- 7 denied by the commission if a proper application had been
- 8 made is a complete defense to an action under this
- 9 subdivision.
- 10 (4) To prevent further construction work upon and obtain full
- 11 relief from construction work previously done upon Lincoln
- 12 Way East property that fails in a substantial manner to
- 13 comply with all the terms and conditions:
- 14 (A) of a certificate of appropriateness issued by the
- 15 commission; or
- 16 (B) of the petition and documents filed with the
- 17 commission upon which the commission is presumed to
- 18 have based approval of the certificate.
- 19 (c) For purposes of obtaining relief sought under this section, it
- 20 is not necessary to allege or prove irreparable harm or injury to a
- 21 person or property. A person entitled to bring an action under this
- 22 section is not required to post a bond unless the court, after a
- 23 hearing, determines that a bond should be required in the interests
- 24 of justice. A person who brings an action under this section is not
- 25 liable to a person for any damages resulting from the bringing or
- 26 prosecuting of the action unless the action was not brought:
- 27 (1) in good faith; or
- 28 (2) in the reasonable belief that:
- 29 (A) this chapter; or
- 30 (B) a commitment, an agreement, or a covenant entered
- 31 into under this chapter;
- 32 had been or was about to be violated or breached.
- 33 (d) The person against whom an action is brought under
- 34 subsection (a) is liable to the interested party bringing the action
- 35 for reasonable attorney's fees and court costs if judgment is
- 36 entered by the court against the person.
- 37 (e) An action arising under this section must be brought in the
- 38 circuit or superior court of St. Joseph County, and a change of

1 venue from the county is not permitted.

2 (f) The remedy provided in this section is not exclusive but is  
3 cumulative to any other remedies available.

4 Sec. 26. (a) A final determination by the commission is subject  
5 to judicial review. An interested party aggrieved by a  
6 determination may file with the circuit or superior court of St.  
7 Joseph County a verified petition for writ of certiorari stating that  
8 the determination is illegal in whole or part. The petition must be  
9 filed not later than sixty (60) days after the date of the final  
10 determination. A change of venue is not permitted in a cause of  
11 action arising under this section.

12 (b) Upon the filing of a petition for writ of certiorari, the  
13 petitioner shall have a copy of the petition served upon each  
14 interested party in the manner provided in this chapter for service  
15 of notice. Upon adequate showing by the petitioner that a copy of  
16 the petition has been served, the circuit or superior court shall  
17 enter an order directing the commission to show cause not later  
18 than thirty (30) days after the entry of the order why a writ of  
19 certiorari should not issue. If the commission or an interested  
20 party appearing in support of the commission's determination fails  
21 to show to the satisfaction of the court that a writ should not issue,  
22 the court may allow a writ directed to the commission. The writ  
23 must prescribe the time in which a return shall be made to the  
24 court. The time:

25 (1) may not be less than twenty (20) days after the date of the  
26 issuance of the writ; and

27 (2) may be extended by the court on application and on notice  
28 to all parties.

29 (c) The return to the writ of certiorari by the commission must  
30 contain copies of all filings, exhibits, and other matters presented  
31 to or considered by the commission in connection with the matter  
32 and the determination from which the appeal is taken, including a  
33 verbatim transcript of the proceedings at each public hearing that  
34 was held. The commission shall prepare the return at the expense  
35 of the party that filed the petition for certiorari. The return to the  
36 writ of certiorari must also show the grounds of the decision that  
37 was appealed.

38 (d) The court may decide and determine the sufficiency of the

statements of illegality contained in the petition without further pleadings and may make a determination and enter judgment with reference to the legality of the decision of the commission on the facts set out in the return to the writ of certiorari. If the court determines that testimony is necessary for the proper disposition of the matter, the court may take evidence to supplement the evidence and facts disclosed by the return to the writ of certiorari. However, a review may not be by a trial de novo, and the court may not consider evidence that should properly or could have been presented to the commission. In passing on the legality of the determination by the commission, the court may:

- (1) reverse;
- (2) affirm, wholly or in part; or
- (3) modify;

the determination of the commission brought up for review. Costs may not be allowed against the commission.

(e) Upon the filing of a petition under this section, the final determination of the commission with respect to which the petition is filed is considered without force and effect pending a final judgment by the court. If the final determination was made with respect to a petition for approval of a proposed rezoning or zoning variance, the approval by the commission is considered nonexistent pending final judgment.

**Sec. 27.** An appeal may be taken to the Indiana court of appeals from the final judgment of the court under section 26 of this chapter reversing, affirming, or modifying the determination of the commission in the same manner and upon the same terms, conditions, and limitations as appeals in other civil actions.

**Sec. 28.** This chapter is cumulative to and does not supersede, preempt, or invalidate a zoning, building, health, or other law, ordinance, or code in effect as of June 30, 2002, except to the extent the law, ordinance, or code is in irreconcilable conflict with this chapter. If an irreconcilable conflict exists, only those parts of the law, ordinance, or code that conflict with this chapter are inapplicable as the parts pertain to the subject matter of this chapter."

(Reference is to HB 1104 as introduced.)

**and when so amended that said bill do pass.**

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Representative Stevenson